Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ZACHARY TATUM, STRATA EXPLORATION, INC., TATUM PETROLEUM OHIO, INC. and TATUM PETROLEUM CORPORATION,

Petitioners,

vs.

COLUMBIA NATURAL RESOURCES, INC. and STOCKER & SITLER OIL COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the "pattern of racketeering activity" element in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c), is unconstitutionally void for vagueness as applied to petitioners in the context of a commercial civil lawsuit premised on common law fraud?

II. Whether the "pattern of racketeering activity" element in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c), remains unconstitutionally void for vagueness as applied to petitioners in the context of a commercial civil lawsuit premised on common law fraud, notwithstanding the "continuity plus relationship" test enunciated in *H.J., Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229 (1989)?

III. Whether the "pattern of racketeering activity" proscribed in 18 U.S.C. § 1962(c) is that through which an enterprise's "affairs" are conducted and directed, rather than just two or more transactions that constitute predicate offenses in the conduct of one's own business affairs?

LIST OF PARTIES

The parties to the proceedings are:

Petitioners: Zachary Tatum, Strata Exploration, Inc., Tatum Petroleum Ohio, Inc., and Tatum Petroleum Corporation

Respondents: Columbia Natural Resources, Inc., and Stocker & Sitler Oil Company

Petitioners represent that there are no parent companies or nonwholly owned subsidiaries of the corporate filers to list for purposes of Supreme Court Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Zachary Tatum, Strata Exploration, Inc., Tatum Petroleum Ohio, Inc., and Tatum Petroleum Corporation, respectfully petition this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this action on July 11, 1995, which reversed a final judgment of dismissal of respondents' RICO claims entered by the United States District Court for the Northern District of Ohio.

OPINIONS BELOW

The order of the Court of Appeals denying petitioners' petition for rehearing, with suggestion for rehearing *en banc*, is reproduced in Appendix C at 26a-27a (September 5, 1995). The judgment of the Court of Appeals is reported at *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101 (6th Cir. 1994); it is reproduced as originally announced in Appendix A at 1a-19a. The District Court's memorandum opinion is not published, and is reproduced in Appendix B at 20a-25a together with the District Court's order.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 11, 1995. A timely petition for rehearing, treated with suggestion for rehearing, *en banc*, was denied by the Court of Appeals on September 5, 1995. (Note: The Sixth Circuit Court of Appeals has a published rule that "[a] suggestion of rehearing *en banc* will also be treated as a petition for rehearing before the original panel." 6th Cir. R. 14). The jurisdiction of the United States Supreme Court rests upon 28 U.S.C. § 1254(1).

This petition draws in question the constitutionality of an Act of Congress, and neither the United States nor any department, office, agency, officer, or employee thereof is a party to this action. Therefore, 28 U.S.C. § 2403(a) may be applicable, and this petition has been served on the Solicitor General of the United States, Room 5614, Dept. of Justice, 10th Street and Constitution Avenue N.W., Washington, D.C. 20530. The lower court dockets do not reflect whether the courts certified notice under 28 U.S.C. § 2403(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves matters of substantive due process as guaranteed by the Due Process Clause of the United States Constitution, U. S. Const. Amend. V and by U. S. Const. Amend. XIV. At issue are provisions of the Racketeer Influenced and Corrupt Organizations Chapter of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961 through 1968. Relevant provisions thereof are reproduced in Appendix D, 28a-70a.

STATEMENT OF THE CASE

A. Procedural History

This case originated on February 2, 1993, with the filing of a complaint in the United States District Court for the Northern District of Ohio, Eastern Division. The respondents were the plaintiffs below, namely, Columbia Natural Resources, Inc., and Stocker & Sitler Oil Company. The defendants were: Zachary Tatum and various related corporations, Strata Exploration, Inc., Tatum Petroleum Ohio, Inc., and Tatum Petroleum Corporation. They are, in turn, the petitioners here.

After initially dismissing the complaint for material pleading defects, the District Court granted respondents leave to amend their complaint. The amended complaint purported to assert claims for relief under the Racketeer Influenced and Corrupt Organizations Act (RICO). The first invoked 18 U.S.C. § 1962(c). It was based strictly upon alleged acts of "mail fraud," "wire fraud" and fraud in violation of the "Travel Act." The second invoked 18 U.S.C. § 1962(d). It alleged that "all of the defendants" conspired to commit "unlawful and illegal acts." For purposes of 18 U.S.C. § 1962(d), the amended complaint did not allege a conspiracy to violate another subsection of 18 U.S.C. § 1962.

B. Course of Proceedings

Petitioners filed separate but contemporaneous motions to dismiss in the District Court, pursuant to Fed. R. Civ. P. 12(b). Petitioners argued, *inter alia*, that a cause of action does not exist for civil conspiracy between a corporation and its agents acting within the scope of their employment. Petitioners also argued in the District Court that RICO's "pattern of racketeering activity" requirement was unconstitutionally void for vagueness as applied to them, depriving petitioners of "fair notice" and, consequently, of substantive due process. During the entire span of proceedings in this case, petitioners have maintained and developed a record based upon the proposition that the "pattern of racketeering activity" requirement is unconstitutionally void for vagueness as applied to them.

On November 1, 1993, the District Court granted the petitioners' motions to dismiss. The court specifically found *inter alia* that persons of ordinary intelligence would not have notice that the business dealings described in the amended complaint constituted a "pattern of racketeering activity" under RICO. The court concluded, therefore, that "the pattern requirement [was] unconstitutionally vague as applied to these [petitioners]."

The court dismissed the claims upon which federal jurisdiction was premised. Having done so, it declined to exercise jurisdiction over any of the pendent state-law claims joined in respondents' pleading.

The respondents appealed the dismissal entered under Fed. R. Civ. P. 12(b)(6) to the United States Court of Appeals for the Sixth Circuit. That Court of Appeals has reversed and remanded. The appellate court found that the RICO "pattern of racketeering activity" requirement was not unconstitutionally vague.

Furthermore, the Court of Appeals refused to apply a substantive due process test to the "continuity plus relationship" test incorporated into the "pattern" requirement by judicial construction. The opinion of the Sixth Circuit was filed July 11, 1995.

C. Statement of Facts

The factual record in this case is less convoluted than in many other cases reaching this Court, in light of the procedural posture of the District Court's dismissal under Fed. R. Civ. P. 12(b)(6). For purposes of factual reference, the well-pleaded *facts* of the amended complaint are to be taken as true and, moreover, construed in a light most favorable to the non-moving parties. *E.g. Conley v. Gibson*, 355 U.S. 41 (1957). However, it must be remembered that the liberal review afforded by Rule 12(b)(6) does not extend to legal conclusions couched as factual allegations and does not allow unwarranted factual inferences either. *Papasan v. Allain*, 478 U.S. 265 (1986).

The Court of Appeals' opinion contains a succinct description of the facts alleged in the amended complaint in Part I. Briefly recited, this case arises out of a series of business dealings between the petitioners and respondents, including various contracts among the parties. The contracts involved the rights to drill oil and gas wells on 47 properties in which the respondents claimed oil and gas leases.

The subject oil and gas leases were generally valid for terms of up to 20 years, or as long as oil or gas was being produced on the leased property "in paying quantities." Respondents held the subject leases for nearly two decades, however took no action of their own to "validate" or extend the majority of these leases. Rather, as leases neared expiration, lease rights were transferred by "farmout agreements" to petitioners Strata Exploration, Inc.

and Tatum Petroleum, Ohio, Inc. These farmout agreements authorized petitioners to begin shallow drilling on the land and extended the "right to earn a sublease" on certain oil and gas leases by drilling a well and maintaining oil and/or natural gas production.

From this contractual relationship, it is further alleged that petitioners fraudulently set out on a course to "jump" respondents' oil and gas claims through a process known as "top leasing." "Top leasing" is a term of art in the oil and gas industry referring to a lease granted by a landowner during the existence of a recorded mineral lease which is to become effective if and when the existing lease expires or is terminated. According to respondents, petitioners would, through fraud and artifice, including letters and phone calls, deceive respondents about the status of drilling of wells and about interests in any topleases. The claim is that petitioners would deliberately refrain from drilling wells and bringing them into production under the farmout agreements; respondents' leases would fail for lack of validation and expire; and then petitioners would use topleases to secure drilling rights.

On certain leases that petitioners validated by drilling, respondents claim they were defrauded of royalties. Again, it is alleged that petitioners, by using mail and telephone, misrepresented the quantities of resources extracted and otherwise deducted unauthorized expenses from royalties owed. The amended complaint further alleges that petitioners used phones and mail to defraud respondents in obtaining topleases and eventually capping producing wells. Lastly, it is alleged that petitioners assisted others in litigation against respondents designed to invalidate respondents' leases so that "concealed" topleases could be utilized.

Respondents' amended complaint alleges the existence of a

RICO "enterprise," termed the "Tatum Group" and said to be comprised of the individual petitioners. The "Tatum Group" is alleged to have committed acts of "racketeering activity" within the meaning of 18 U.S.C. §1961(1), comprised of mail fraud, wire fraud and Travel Act fraud. The "Tatum Group," it is alleged, has affected interstate commerce, however, the enterprise is not given any defined structure or goals distinguishing it from petitioners.

In fact, many of the allegations of respondents' amended complaint contend that petitioners used the mails and wires to simply further their individual business matters. For instance, the amended complaint alleges that one of the claimed fraud schemes had the "object . . . to *put Tatum* Petroleum Corp. *in a position to cancel* the CNR 'deep' rights by plugging wells drilled pursuant to the Farmout Agreements and thereby activate the validity of the new topleases which included the 'deep' rights belonging to Columbia or CNR." In another portion of the amended complaint, relative to the "royalties" claim, it is alleged that petitioners had a scheme "to *convert to their own use* royalties and production resources belonging to Columbia and CNR."

Similarly, the alleged scheme to promote litigation against respondents by a third party was supposedly done "to deprive Columbia, CNR and S & S of rights to [a] . . . lease *so Tatum* Petroleum Corp. *could acquire them*. . . ." The amended complaint is replete with other allegations that petitioners engaged in mail or wire fraud to ostensibly somehow further their *own* business interests.

The amended complaint categorizes various claims for relief asserted against petitioners as breach of contract, business interference, accounting, conversion, common law fraud, RICO and conspiracy. While the amended complaint includes an allegation that the petitioners engaged in mailings and phone

calls, "in furtherance of the enterprise's activities," the complaint does not specify that any particular petitioner directed the "Tatum Group." Moreover, the amended complaint does not allege what "affairs" of the designated enterprise are supposedly advanced by any acts or omissions of any petitioner aside from, or in addition to, the petitioners' *own* affairs.

Upon this record of alleged business fraud, this case is now before this Honorable Court, and a writ of certiorari for further review is respectfully requested.

REASONS FOR GRANTING THE WRIT

SUMMARY

In *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), the Supreme Court held that allegations and proof of relatedness of criminal acts and continuity of criminal activity were necessary to state and establish a pattern of racketeering activity within the meaning of RICO. Though concurring in the disposition of that case, Justice Scalia, along with the Chief Justice and Justices O'Connor and Kennedy who joined in his opinion, voiced concern that the test of "continuity plus relationship" offered little in the way of guidance for RICO's use. Justice Scalia wrote:

> No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

H.J., Inc. v. Northwestern Bell, 492 U.S. at 256, Scalia J., concurring.

This case presents the constitutional challenge envisioned by Justice Scalia. Unlike the case of *Daniel M. Tabas, et al. v. Harriette S. Tabas, et al.*, 47 F.3d 1280 (3rd Cir. 1995), Case No. 94-1629, *cert. denied*, May 30, 1995, the instant case has a fully-developed record on the question of RICO's constitutionality. This case does not bring petitioners' substantive due process challenge to this Court as an afterthought or mere shoestring argument. To the contrary, petitioners' void for vagueness challenge to RICO's "pattern" element has consistently been and remains the focus in the within case.

Reduced to its most accurate form, this case is essentially a dispute between contracting parties; contracting businesses, in fact, in a competitive relationship. There are allegations of fraud and deceit contained in the amended complaint. These are supposedly elevated to so-called "predicate offenses" merely because the petitioners conducted business over the phone, through the mail, and across state lines.

Zachary Tatum is not a racketeer, nor will he be one, no matter how this case comes out; but he is unfairly threatened financially by a vague rule of law. While it is true that petitioners' substantive due process challenge to RICO so premised is directed to RICO as applied, it is equally true that businesses and businessmen similarly situated are unfairly threatened by the provisions of RICO, which have become a tool of anti-competitiveness far beyond Congress' design. In this case, petitioners and respondents, though they compete in business, they are competitors in the same sense, and in roughly the same proportions, as David and Goliath. Petitioners are by no means the larger of the two, and RICO gives "Goliath" the slingshot.

The Supreme Court of the United States has every reason to narrow the focus of RICO. Congressional intent and statutory language are two fundamental reasons. As applied, the law now threatens the businesses it was designed to protect. In part, RICO

was intended to foster competition in American business by measures designed to curb "organized crime's" infiltration therein. Presumably, Congress did not intend to promote monopolization of industries by arming business competitors with the blunt instrument of RICO's treble damage and attorney fee remedies.

Congress may have intended civil RICO to apply to persons outside the stereotypical families of organized crime, but Congress surely did not intend to deputize every commercial litigant into a "private attorney general" with "super plaintiff" status and advantage. The law may be broad, but it was not enacted to provide financial incentive for "federalizing" a common law breach of contract claim, for expanding a common law fraud claim to predicate act, and bootstrapping predicate acts into "racketeering."

The Court should confine civil liability under RICO within the limits defined by substantive due process. This case squarely presents the void for vagueness issue, one that was raised from the outset. RICO should be confined to application comporting with the intent expressed in the prologue to the statute itself: toward the "eradication of organized crime in the United States."

ARGUMENT

I.

THE "PATTERN OF RACKETEERING ACTIVITY" ELEMENT IN THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. § 1962(c), IS UNCONSTITUTIONALLY VOID FOR VAGUENESS AS APPLIED TO PETITIONERS IN THE CONTEXT OF A COMMERCIAL CIVIL LAWSUIT PREMISED ON COMMON LAW FRAUD.

The respondents' case was premised upon 18 U.S.C.

§ 1962(c), with a derivative conspiracy claim under 18 U.S.C. § 1962(d). 18 U.S.C. § 1962(c) reads, in relevant part:

> It shall be unlawful for any person employed or associated with any enterprise ... to conduct ... such enterprise's affairs through a pattern of racketeering activity.

The phrase "pattern of racketeering activity" is given a definition in 18 U.S.C. § 1961(5) as follows:

> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

This, as the Supreme Court has observed, is not really so much a definition as it is a statement of "a minimum necessary condition for the existence of" a pattern:

> As we remarked in *Sedima, supra,* at 496, n 14, 87 L Ed 2d 346, 105 S Ct 3275, the section of the statute headed "definitions," 18 USC § 1961 (1982 ed and Supp V) [18 USC § 1961], does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern.

H.J., Inc. v. Northwestern Bell, supra, at 492 U.S. 237, citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 at 496, n. 14 (1985).

It is fundamental that laws must provide fair notice to those who must obey, and reasonable guidelines to those who must enforce them. If they do not, they are "void for vagueness" because they deprive one of substantive due process guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 108 (1909).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Graynard v. City of Rockford, 408 U.S. 104, 108-109 (1972).

Stated otherwise, a statute is unconstitutionally vague if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harris,* 347 U.S. 612, 617 (1954). It is unconstitutionally vague

if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connaly v. General Constr. Co.*, 269 U.S. 385, 391 (1926). A vague law is one drafted with such generality as "to risk ensnarement of the innocent in a net designed for others." L. Tribe, *American Constitutional Law* 718 (1978). In the case at bar, RICO, a net designed for organized crime, is impermissibly being utilized to prejudicially ensnare a business competitor which is, in and of itself, a reflection of RICO's intolerable vagueness.

What is a "pattern of racketeering activity?" 18 U.S.C. § 1961(5) does not truly say. The definition says only that it is not one act. Because of this lack of direction and specificity from Congress, this Court has been called upon on numerous occasions to effectively supplement (if not supplant) the terminology of the RICO statute. Despite its best efforts, this Court has had little success bringing consistency and meaning to RICO and its use in a manner comporting with the reasonable intendment of Congress.

RICO is both civil and criminal in nature. Even its civil remedy, however, is punitive. Treble damages are compensation times three, something beyond remedying a private injury. The law ought therefore to have the degree of certainty required of a criminal statute. *H.J. v. Northwestern Bell., supra,* at 492 U.S. 255, concurring opinion, citing *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954).

What is remarkable about RICO is that there is virtually no disagreement as to why it was enacted. RICO was intended to aid in the "eradication" of long-standing "racketeering activity" conducted by "organized crime:"

> It is the purpose of this Act to seek the eradication of organized crime in the United

> States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970). (84 Stat. 922-923 is reproduced in Appendix D, 39a). However, RICO's drafters did not even attempt to provide guidance as to effecting RICO's intent by defining "organized crime." As observed by Members of Congress Conyers, Mikva and Ryan in voicing dissenting views to RICO's provisions:

> [O]ne searches the bill in vain for a definition of "organized crime." In a criminal statute where the term "organized crime" is an operative device, it is not defined. When asked about the omission, the drafters explained that it was impossible to define, but everybody knew what it was.

H.R. Rep. No. 91-1549, 2 U.S. Cong. & Adm. News (1970), p. 4091 (dissenting views of Reps. Conyers, Mikva and Ryan). This legislative history is reproduced in Appendix D, 70a.

Even while reversing the Second Circuit in *Sedima, S.P.R.L. v. Imrex Co., supra,* for having tried to narrow the statute, the Supreme Court echoed the appellate court's reference to "Congress' undeniable desire to strike at organized crime . . . ." *Id.*, 473 U.S. at 494. The *Sedima* Court acknowledged that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." *Id.*, 500. The Court concluded, however, that this doesn't demonstrate ambiguity,"[i]t demonstrates breadth." *Id.*, at 499. Petitioners respectfully submit that it also demonstrates vagueness:

> The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, *and the failure of Congress and the courts to develop a meaningful concept of "pattern."*

Sedima, 473 U.S. at 500 (emphasis added).

One thing is clear: RICO's "pattern of racketeering activity" was meant to reach the activities of organized crime. Beyond that, both clarity and consensus are lost. Therefore, the statute ought to be restricted, as a matter of substantive due process, to those to whom RICO was directed (to those who were given express notice that RICO was directed to their activities):

> [I]f anything is clear about RICO, it is that "a pattern of racketeering activity" is intended to encompass the activities of organized crime families. In *H.J., Inc.*, the Court explicitly noted that in drafting RICO to target "patterns" of racketeering activity, Congress' main focus was the eradication of organized crime.

United States v. Angiulo, 897 F.2d 1169, 1179 (1st Cir. 1990), *cert. denied*, 498 U.S. 845 (1990).

A person of ordinary intelligence should know that certain things will make him a "racketeer." For instance;

> Given the history behind RICO, we have no doubt that the murder conspiracies and the gambling and loansharking operations for

> which defendants were charged and convicted here are precisely the type of activity that Congress intended to reach through RICO.

United States v. Angiulo, 897 F.2d 1179-1180.

A person of ordinary intelligence should not also be expected to know that breaching a contract for royalties on an oil or gas lease, if true as to petitioners, or otherwise competing for business under the terms of a contractual arrangement, would put him in the same category as someone who conspires to murder or engage in gambling and loansharking operations. To persons of ordinary intelligence, after all, there is a difference, and a rather profound one, between breaking a promise over the phone or by sending a letter and, on the other hand, plotting a crime.

Civil RICO should not be accepted as the "federalization of garden variety fraud, that is directly contrary to Congress' expressed intent." *Tabas v. Tabas, supra*, Chief Judge Sloviter, dissenting, n. 37. It should not include a case such as the present, a case in which, though fraud is alleged, the central issues are contractual in nature involving competing business firms or, at worst, common law fraud. Civil RICO is a weapon against societal, as well as individual harm, to be employed against long-term criminal activity that carries some quantum of threat to society, not merely by parties to soured business relationships. *Id.*, J. Greenberg, dissenting.

The instant case serves as a realization of fear recognized by Reps. Conyers, Mikva and Ryan stemming from the "poor draftsmanship" of RICO "employ[ing] penalties . . . which are both abusive and pregnant with the potential for abuse." For example, they commented:

> Indeed, another section of the title — section 1964(c) — provides invitation for disgruntled and malicious competitiors to harass innocent businessmen engaged in interstate commerce by authorizing private damage suits. A competitor need only raise the claim that his rival has derived gains from two games of poker, and, because this title prohibits even the "indirect use" of such gains — a provision with tremendous outreach — litigation is begun. What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish — destruction of the rival's business.

(U.S. Cong. and Adm. News [1970], pp. 4081, 4083). The same is true of 18 U.S.C. §§1962(c) and 1964(c), as being used in this case against petitioners.

Because RICO does not reasonably give petitioners fair notice that the alleged acts of using mail, making phone calls and traveling in the normal course of business carry indicia of "organized crime", RICO infringes substantive due process as applied herein. Essentially, petitioners are alleged to have merely used the ordinary tools of American business (mail, phones and travel) and not the far drastic and feared tools of organized crime (murder, gambling, loansharking, drug trafficking, extortion, force and other such social exploitation).

II.

THE "PATTERN OF RACKETEERING ACTIVITY" ELEMENT IN THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. § 1962(c), REMAINS UNCONSTITUTIONALLY VOID FOR VAGUENESS AS APPLIED TO PETITIONERS IN THE CONTEXT OF A COMMERCIAL CIVIL LAWSUIT PREMISED ON COMMON LAW FRAUD, NOTWITHSTANDING THE "CONTINUITY PLUS RELATIONSHIP" TEST ENUNCIATED IN *H.J., INC. V. NORTHWESTERN BELL TELEPHONE COMPANY,* 492 U.S. 229 (1989).

To its credit, the Supreme Court has attempted to put some identifiable meaning into a "pattern of racketeering activity." A pattern requires both continuity and relationship among the racketeering predicates.

> A pattern is not formed by "sporadic activity," S Rep No. 91-617, p 158 (1969) and a person cannot "be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses." 116 Cong Rec 18940 (1970) (Sen. McClellan). Instead, "[t]he 'pattern' itself requires the showing of a relationship" between the predicates, *ibid.*, and of " 'the threat of continuing activity,' " *ibid.*, quoting S Rep No. 91-617, *supra,* at 158. "It is this factor of *continuity plus relationship* which combines to produce a pattern." 116 Cong Rec, at 18940 (emphasis added). RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that

> they amount to or pose a threat of continued criminal activity.

H.J., Inc. v. Northwestern Bell, supra, at 492 U.S. 239 (emphasis in the original).

The concurring opinion in *H.J.* termed this statutory construction itself "murky" and added that "continuity plus relationship" was "about as helpful . . . as 'life is a fountain.' " *H.J. v. Northwestern Bell,* 492 U.S. at 252. The Court of Appeals below refused to subject this arguably "murky" statutory construction to substantive due process evaluation. The Court held:

> We reject the invitation to subject the Supreme Court's "continuity plus relationship" test to a vagueness analysis. There is simply no precedent for such action.

(*See* Appendix A, 14a). Petitioners respectfully submit that when a test of statutory construction or application is so inextricably intertwined with the language of a statute, such that it effectively becomes part of the statute, that test becomes subject to analysis of its constitutional (substantive due process) muster. This case presents an opportunity to announce precedent to that effect, given the "continuity plus relationship" test read into RICO's "pattern of racketeering activity." After all, the "continuity plus relationship" test is a product of "[e]levating to the level of statutory text a phrase taken from the legislative history. . . ." *Id.*

However, Justice Scalia also said that he himself could not accurately or appropriately identify what a "pattern of racketeering activity" was. The statute's "relatively narrow focus upon organized crime" demonstrated that a pattern was something more than multiple predicates. "But what that something more is, is beyond me."

> It is, however, unfair to be so critical of the Court's effort, because I would be unable to provide an interpretation of RICO that gives significantly more guidance concerning its application. It is clear to me from the prologue of the statue, which describes a relatively narrow focus upon "organized crime," see Statement of Findings and Purpose, The Organized Crime Control Act of 1970, Pub L 91-452, 84 Stat 922-923, that the word "pattern" in the phrase "pattern of racketeering activity" was meant to import some requirement beyond the mere existence of multiple predicate acts. Thus, when Sec. 1961(5) says that a pattern "requires at least two acts of racketeering activity" it is describing what is needful but not sufficient. (If that were not the case, the concept of "pattern" would have been unnecessary, and the statute could simply have attached liability to "multiple acts of racketeering activity"). But what that something more is, is beyond me. As I have suggested, it is also beyond the court.

H.J., Inc. v. Northwestern Bell, concurring opinion, 492 U.S. at 252, 254-255. As the concurring opinion suggests, it is beyond the courts as well.

> The question of what activity constitutes a pattern under RICO is a notoriously difficult one to answer.
>
> *Kyne v. Deloitte & Touche,* 12 F.3d 212 (6th Cir. 1993).

What is a pattern of racketeering activity? The question was difficult for learned attorneys and jurists to answer before *H.J* (let alone for lay persons to understand or have fair notice of its meaning). It remains so. As Justice Scalia further suggests, the *H.J.* test arguably "increases rather than removes the vagueness" from RICO's "pattern" element. *H.J. Inc. v. Northwestern Bell, supra*, at p. 255.

Since the decision in *H.J.*, this Court has denied certiorari in several cases that have challenged RICO's "pattern of racketeering activity" as unconstitutionally vague. *United States v. Angiulo*, 897 F.2d 1169 (1st Cir. 1990), *cert. denied*, 498 U.S. 845 (1990); *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 500 U.S. 915; *United States v. Woods*, 915 F.2d 854 (3d Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *United States v. Masters*, 924 F.2d 1362 (7th Cir. 1991), *cert. denied*, 500 U.S. 919 (1991); *United States v. Coiro*, 922 F.2d 1008 (2d Cir. 1991), *cert. denied*, 501 U.S. 1217 (1991) *United States v. Glecier*, 923 F.2d 496 (7th Cir. 1991), *cert. denied*, 502 U.S. 810 (1991); *United States v. Dischner*, 974 F.2d 1502 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1290 (1993). These cases are all materially distinguishable.

These were all criminal cases. These were the cases the Fourth Circuit cited in *United States v. Bennett*, 984 F.2d 597, 606 (4th Cir. 1993), when the court said its sister circuits have "uniformly rejected" the "void for vagueness" challenge. *Bennett* rejected it too.

While what *Bennett* said about the other circuits is true, it is true only for this reason: When a statute is challenged as void for vagueness, and the First Amendment is not implicated, the vagueness challenge is limited to the facts of the particular case. *Bennett, supra*, at 984 F.2d 605; *United States v. Angiulo, supra*, at 897 F.2d 1179. In each of the cases *Bennett* cites, and in *Bennett* itself, the courts had no doubt that the crimes fit the RICO

pattern. They rejected a vagueness challenge, and properly so; but in doing so they said — with equal propriety — that their holdings were limited to the facts before them. For instance, Judge Posner commented in *United States v. Masters, supra*:

> *The interpretive problems and resulting vagueness that afflict the RICO statute come from its application to lawful enterprises* that commit occasional criminal acts. The miniature suburban mafia that the facts of this [Masters] case disclose is within the statute's core.

Masters, 924 F.2d at p. 1367. (Emphasis added).

In *Bennett*, the Fourth Circuit had before it an enterprise that was defrauding insurance companies by setting fire to insured real estate ("the statute provided . . . appellants adequate notice that . . . arson . . . attempted murder and other acts or threats of violence . . . fell within 'RICO.' " *Id.* at pp. 606-607). In *United States v. Angiulo, supra*, there was a gambling, loansharking, extortion and murder conspiracy operation headed by organized crime. In *United States v. Pungitore, supra*, there was illegal sports bookmaking, illegal lottery, conspiracy to distribute methamphetamines, as well as murder alleged against the Philadelphia "mafia." In *United States v. Woods, supra*, it was "hardcore political corruption" — a public contract kickback scheme at issue. In *United States v. Masters, supra*, the court called it a "lurid mixture of corruption and murder" in suburban Chicago. In *United States v. Coiro, supra*, the defendants were found guilty of bribery, money laundering and obstruction of justice on behalf of organized crime. In *United States v. Glecier, supra*, it was bribery and official misconduct of a judge. Finally, at issue in *Dischner, supra*, were criminal charges involving political bribery, extortion and "kickbacks" within the "hardcore of racketeering conduct prohibited by the statute." *Dischner, supra* at p. 1510.

The Supreme Court properly denied certiorari in those cases. The Supreme Court should grant certiorari in the instant case which does not involve any such allegations of crime against petitioners.

Despite the *H.J.* Court's attempt to eliminate the ambiguity, the vagueness, of RICO's "pattern" requirement and, thereby, make RICO's use more uniform, disparities between courts and between circuits continue to exist. This was forecasted by Justice Scalia in his *H.J.* concurrence:

> There is no reason to believe that the Courts of Appeals will be more unified in the future, than they have in the past, regarding the content of this law.

H.J., Inc. v. Northwestern Bell, supra at p. 255. The Courts of Appeals are now struggling with determining pattern "continuity," in particular, in the wake of the *H.J.* decision. There is no "continuity" standard, despite *H.J. E.g., Apparel Art, Int'l v. Jacobson*, 967 F.2d 720, 722-723 (1st Cir. 1992) single episode does not constitute a pattern even if it involves multiple crimes; *United States v. Aulicino*, 44 F.3d 1102, 1111-1114 (2nd Cir. 1995) continuity focus on nature of activity and its duration; *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989) one scheme, one goal, limited purpose, one perpetrator, one set of victims, one year duration does not constitute pattern; *In re Burzynski*, 989 F.2d 733, 743 (5th Cir. 1993), single, discrete and otherwise lawful commercial transaction does not constitute pattern even though multiple acts of fraud extend over five years; *Vemco, Inc. v. Camardella*, 23 F.3d 129, 135 (6th Cir.), *cert. denied*, 115 S. Ct. 579 (1994) single victim, single scheme, single purpose and 17 months duration does not constitute pattern; *McDonald v. Schencker*, 18 F.3d 491, 497 (7th Cir.1994) continuity factors include number and variety of predicate acts and their duration, number of victims, presence of separate

schemes, and occurrence of distinct injuries; *Primary Care Investors, Seven, Inc. v. PHP Health Care Corp.*, 987 F.2d 1208, 1215-1216 (8th Cir. 1993) continuity determined by duration alone; *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535 (9th Cir. 1992) predicate acts designed to bring about a single event do not demonstrate pattern continuity; *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1543 (10th Cir. 1993) continuity factors include duration, extensiveness of scheme, that is, number of victims, number of predicates, variety of predicates, distinctiveness of injuries, complexity and size of scheme, and nature of activity; *Cox v. Administrator of United States Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir.), *modified*, 30 F.3d 1347 (11th Cir. 1994) continuity focus on duration alone.

Thus, it is clear that the *H.J.* test has not made RICO's "pattern" element constitutionally acceptable, let alone meaningful, for petitioners to know whether their conduct, if true, is covered by RICO.

III.

THE "PATTERN OF RACKETEERING ACTIVITY" PROSCRIBED IN 18 U.S.C. § 1962(c) IS THAT THROUGH WHICH AN ENTERPRISE'S "AFFAIRS" ARE CONDUCTED AND DIRECTED, RATHER THAN JUST TWO OR MORE TRANSACTIONS THAT CONSTITUTE PREDICATE OFFENSES IN THE CONDUCT OF ONE'S OWN BUSINESS AFFAIRS.

Incident to its declaration that RICO's "pattern" requirement was *not* unconstitutionally vague as applied to petitioners, the Court of Appeals otherwise held that respondents' amended complaint stated a RICO § 1962(c) claim. This is despite the fact that respondents' amended complaint fails to identify an enterprise (other than by label) being an "association in fact" that is *meaningfully different* from the petitioners alleged to make it

up. The vagueness of 18 U.S.C. § 1962(c) lends itself to oversight of the requirement that a RICO defendant's predicate acts amount to conduct (direction) of the alleged enterprise's affairs and not just the defendant's own business affairs.

The respondents' amended complaint does not expressly allege that petitioners, or any one of them, directed (by operation or management) distinct affairs of the so-called "Tatum Group" enterprise said to consist of the petitioners. This is despite the fact that respondents' amended complaint was filed June 30, 1993 and, thus, should have drawn guidance from this Court's decision in *Reves v. Ernst & Young*, 507 U.S.__, 113 S. Ct. 1163 (1993) [decided March 3, 1993]. At best, the amended complaint alleges only that petitioner Zachary Tatum controlled the other corporate petitioners and that the petitioners somehow acted "in furtherance of the enterprise's activities." On a threshold level, respondents' amended complaint is insufficient to state a RICO claim for relief to the extent it fails to directly articulate any distinct direction (operation or management) by petitioners of that which is labeled an "enterprise".

What is perhaps more striking about the amended complaint is that it is repetitive in its claims that petitioners committed predicate acts of mail, wire and Travel Act fraud designed to advance the petitioners' own individual or corporate interests. For instance, the amended complaint alleges that "Tatum Ohio" and "Strata" fraudulently allowed respondents' leases to expire so that "topleases became valid . . . in their name. . . ." It is otherwise alleged that Tatum Ohio fraudulently concealed that it obtained topleases "in its own name." Similarly, it is alleged that petitioners fraudulently concealed topleases, royalties and production income "wrongfully converted to their own use." Such allegations fail to state a claim for relief under 18 U.S.C. § 1962(c) inasmuch as they fail to meaningfully differentiate between affairs of an alleged enterprise and affairs of the petitioners themselves.

In the case of *Richmond v. Nationwide Cassel L.P.*, 847 F. Supp. 88 (N.D. Ill. 1994), *aff'd*, 52 F.3d 640 (7th Cir. 1995), the court seized upon the Supreme Court's lead in *Reves v. Ernst & Young, supra*, and held:

> [I]t is necessary that the Complaint identify such an "association in fact" that is meaningfully different in the RICO context from the units that go to make it up . . . .

847 F. Supp. at p. 91. In the absence of the requisite meaningful differentiation, the Court granted defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6), which was affirmed.

In *Richmond, supra*, the court paid respect to a poignant observation made by this Court in *Reves v. Ernst & Young, supra:*

> Last year's opinion in *Reves v. Ernst & Young* . . . . referred obliquely (albeit in a different context) to that need to specify a RICO-meaningful relationship when it said that Section 1962(c) "liability depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs." (Emphasis original to Reves).

Richmond v. Nationwide Cassel, supra at p. 91. What this Supreme Court is said to have referred to "obliquely" in *Reves,* this Court now has the opportunity to express unequivocally in the instant case; that is, that a RICO § 1962(c) claim must be founded upon predicate acts which somehow conduct an enterprise's affairs and not just a given defendant's business affairs or interests.

The Court of Appeals opinion in *Richmond, supra*, adds the following to this analysis:

> "The hallmark of an enterprise is a 'structure.' " (citations omitted). There must be "a structure and goals separate from the predicate acts themselves."(citations omitted) . . . .
>
> [A] plaintiff's naming of a string of entities does not allege adequately an enterprise.
>
> * * *
>
> [W]hen an entity . . . conducts [its] . . . own affairs through a pattern of racketeering, there is no enterprise and hence no valid § 1962(c) RICO claim.

Richmond v. Nationwide Cassel L.P., 52 F. 3d at pp. 645-647. The amended complaint filed against petitioners does not adequately allege an "enterprise" by separate structure and goals and does not allege any such separate goals were advanced in any fashion. The amended complaint does not allege any "enterprise" affairs beyond or separate from predicate acts. The Court of Appeals below erred, to petitioners' prejudice, in overlooking these points.

RICO's Focus Is Upon Racketeer Influenced and Corrupt Organizations.

The statute focuses upon corrupt enterprises, not just corrupt activity. 18 U.S.C. § 1962(c) speaks of conducting the "affairs" of an enterprise through a pattern of racketeering activity. "Through" a pattern infers a relationship between the affairs of the enterprise and the pattern. The pattern is the instrument

through which the affairs of the enterprise are conducted. *United States v. Gibson*, 486 F. Supp. 1230, 1245 (S.D. Ohio 1980). The "affairs" of an enterprise must necessarily mean the way it completes distinguishable business.

18 U.S.C. § 1962(c) speaks of ". . . the conduct of such enterprise's affairs . . . ." It proscribes, not simply a pattern of racketeering activity, but a pattern of such activity through which the affairs of an enterprise are conducted. What are the "affairs" of an enterprise? They are its business which must be identifiably different from a RICO defendant's business affairs. What are the affairs of the "enterprise" labeled in respondents' amended complaint? It does not say.

A complaint under 18 U.S.C. § 1962(c) should match the statute. This is not just a matter of pleading predicate acts, or even continuity and relationship. The complaint must focus on a truly meaningful enterprise, as the statute does, different from the units (or defendants) that make it up. *Richmond v. Nationwide Cassel L.P., supra.* The amended complaint in the present case simply does not. There is no allegation to support a claim under 18 U.S.C. § 1962(c), properly applied. If the amended complaint pleads several acts, even related acts (if true), still, there is no well-pleaded factual allegation that a pattern of racketeering was the instrument by which the affairs of an enterprise — as opposed to the affairs of petitioners — were conducted.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted. The Court should restrict civil RICO within the bounds of substantive due process. As applied to the present case, to the petitioners herein, RICO is unconstitutionally void for vagueness, as the District Court ruled. The Court of Appeals erred, to petitioners' prejudice, in reversing that decision.

The Court should also announce a test for RICO liability that is in accord with the full language of 18 U.S.C. § 1962(c). RICO was designed to eradicate corrupt enterprises, not to visit destruction upon those who allegedly breach a contract over the phone or by way of mail. A complaint under 18 U.S.C. § 1962(c) must identify an "association in fact" that is meaningfully different from the units that are said to comprise it. This was not set out in the amended complaint against petitioners and, thus, the Court of Appeals erred, to petitioners' prejudice, in finding that respondents' amended complaint stated a claim for relief.

Respectfully submitted,

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APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED JULY 11, 1995

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0203P (6th Cir.)
File Name: 95a0203p.06

No. 93-4299

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COLUMBIA NATURAL RESOURCES, INC.; STOCKER & SITLER OIL COMPANY,

Plaintiffs-Appellants,

v.

ZACHARY TATUM; STRATA EXPLORATION, INC.; TATUM PETROLEUM OHIO, INC.; TATUM PETROLEUM CORPORATION,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed July 11, 1995

Before: MILBURN, BOGGS, and NORRIS, Circuit Judges.

Appendix A

BOGGS, Circuit Judge. Columbia Natural Resources, Inc. and Stocker & Sitler Oil Company appeal an order holding that the phrase "pattern of racketeering activity" in the RICO statute, 18 U.S.C. § 1962(c), is "void for vagueness" as applied to these defendants and granting a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). For the reasons set out below, we reverse.

I

This case arises out of a series of oil and gas contracts between Columbia Natural Resources and Zachary Tatum and his affiliated companies.[1] Columbia held approximately 47 leases allowing it to drill for oil on various pieces of real property belonging to Ohio farmers. These leases, which represented both shallow and deep drilling rights, were valid for a period of years, unless Columbia drilled wells and began to extract resources, in which case they were valid for the entire period of production. Apparently, in 1980 and 1981, Columbia executed several "farmout" agreements with Tatum and his companies. These farmout agreements authorized Tatum to begin shallow drilling on the land. The effect of this, once a well began producing, was to "validate" Columbia's lease, making it effective for the entire period of production. Columbia alleges that these farmout agreements opened a door for Tatum to commit a pattern of mail and wire fraud.

In particular, Columbia alleges that Tatum engineered various schemes that could be called "claim jumping." Columbia alleges that Tatum signed "topleases" with the landowner, which

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1. Throughout this opinion, "Columbia" refers to both plaintiffs. "Tatum" refers to Zachary Tatum and his affiliated companies: Strata Exploration, Inc., Tatum Petroleum Ohio, Inc., and Tatum Petroleum Corporation.

would be effective if Columbia's lease were not "validated." Tatum would then, through fraud and artifice, including letters and phone calls, deceive Columbia about the status of drilling on the wells and about its interest in any topleases. In effect, Tatum would deliberately refrain from drilling wells and bringing them into production. This prevented Columbia from validating the leases and caused the leases to expire at the end of their term. Tatum would then use the toplease to secure the right to drill on the land.

Columbia was, by virtue of an "extension, renewal and replacement clause" in the original farmout agreements, entitled to royalties and the rights represented by any topleases secured by Tatum. Columbia alleges that Tatum misrepresented the status of drilling on the sites, lulling it into believing that its leases would be validated. Columbia also alleges that, after failing to drill the wells, Tatum evaded the effect of the extension clause by misrepresenting its interest in the topleases so that it could retain all of the royalties.

Columbia also alleges that on the leases Tatum validated by drilling, Tatum defrauded Columbia of its royalties. It did this, again using the mail and telephone, by misrepresenting the amount of resources it had extracted from the well and by deducting unauthorized expenses from the royalties owed to Columbia.

Columbia alleges that Tatum began another scheme in 1989. Tatum now used front men to obtain topleases and then capped producing wells. This deprived Columbia of a validated lease and caused its shallow and deep drilling rights to lapse. Columbia again alleges that Tatum did so with the intent to defraud Columbia and that Tatum used the phones and mail to further the scheme.

Finally, Columbia alleges that Tatum encouraged and assisted lawsuits designed to break Columbia's leases so that Tatum could utilize concealed topleases. In particular, Columbia alleges that Tatum assisted at least one leaseholder in such an effort, and then misrepresented his role to Columbia, through the mail and on the telephone, in an attempt to conceal his involvement.

Columbia sued Zachary Tatum and his affiliated companies for approximately $10,000,000 in actual damages. Columbia's complaint included a series of contract and tort claims, as well as civil RICO claims. The claims of wire fraud, mail fraud and Travel Act violations served as the basis for the RICO suit.

The district court dismissed plaintiffs' first complaint for failing to comply with Fed. R. Civ. P. 9(b)'s requirement that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Columbia amended the complaint within the required 30 days, providing the court with a 75-page complaint and 34 exhibits totalling approximately 260 pages, alleging numerous RICO violations and pendent state law claims. The district court dismissed this complaint, apparently because the court held that the phrase "pattern of racketeering activity" was unconstitutionally vague and because the complaint failed to state a claim under Rule 12(b)(6). Furthermore, the court declined to exercise jurisdiction over the pendent state law claims.

Columbia argues, first, that the term "pattern of racketeering activity" is not void for vagueness as applied to these defendants; and, second, that it has alleged sufficient facts to allow the claim to proceed past a motion to dismiss.

Appendix A

II

The due process clause of the Constitution provides the foundation for the void for vagueness doctrine. U.S. Const. amend V. The Supreme Court did not accord vagueness a constitutional dimension until *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 108 (1909). From the earliest cases to hold that a statute was unconstitutionally vague, *(see International Harvester Co. v. Kentucky*, 234 U.S. 216 (1914), and *Collins v. Kentucky*, 234 U.S. 634 (1914)), to the present, the Supreme Court has made it clear that the vagueness doctrine has two primary goals. First, to ensure fair notice to the citizenry; second, to provide standards for enforcement by the police, judges, and juries.

The requirement that the government write statutes that provide fair notice to those who must obey them is a traditional basis of the vagueness doctrine. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1925). The requirement of fair notice is not applied mechanically or without regard for the common sense judgment that people do not review copies of every law passed.

The second concern, that of minimal enforcement standards, is related to the first. While the first involves notice to those charged with obeying the law, the second part relates to notice to those who must enforce the law, be they the police, judges, or juries. The standards of enforcement must be precise enough to avoid "involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result." *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927).

As a practical matter, the Supreme Court considers the latter concern the most important. This reflects the common sense understanding that the average citizen does not read, at his leisure, every federal, state, and local statute to which he is subject. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement.'") (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

The Supreme Court clearly stated the jurisprudential basis for these two parts in *Grayned v. City of Rockford* 408 U.S. 104, 108-09 (1972).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissably delegates basic policy matters to policemen, judges, and juries for

resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Underlying part of the second test is a concern over the implications for the constitutionally mandated separation of powers, because vague laws pass much of the burden of "legislating" from Congress to the judiciary. *See, e.g., James v. Bowman,* 190 U.S. 127 (1903); *Trade-Mark Cases,* 100 U.S. 82 (1879); *United States v. Reese,* 92 U.S. 214 (1875). In the criminal context, this concern was recognized by Chief Justice Marshall. *See United States v. Wiltberger,* 18 U.S. 76, 95 (1820) (Marshall, C.J.) ("[i]t is the legislature, not the court, which is to define a crime, and ordain its punishment").

The classification of a federal statute as void for vagueness is a significant matter. The Supreme Court has held that " '[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " *Chapman v. United States,* 500 *U.S.* 453, 464 (1991) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988)). *See also Crowell v. Benson,* 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised" it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").[2]

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2. *See generally* Joseph E. Bauerschmudt, Note, *"Mother of Mercy—Is This The End of Rico?" — Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO "Pattern",* 65 Notre Dame L. Rev. 1106 (1990); David W. Gartenstein & Joseph F. Warganz, Note, *RICO's "Pattern" Requirement: Void For Vagueness?,* 90 Colum. L. Rev. 489 (1990).

Appendix A

III

The issue presented for our review is whether applying the Supreme Court's teachings on vagueness to the term "pattern of racketeering activity" leads to the conclusion that it is unconstitutionally vague. This examination takes place in light of not only the specific text of the statute but also in light of the Supreme Court's own discussions of the issue. We conclude that the term "pattern of racketeering activity" is not unconstitutionally vague.

The Racketeer Influenced and Corrupt Organizations Act (RICO) prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). Tatum attacks the use of the phrase "pattern of racketeering activity," contending that it is unconstitutionally vague. However, our examination of the statute does not end with a simple review of the quoted language. Instead we turn to the rest of the statute.

RICO itself provides an initial definition of what constitutes a pattern of racketeering activity. A "pattern of racketeering activity" consists of "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). The next inquiry, in order to understand fully the scope of the statute, is to determine what the statute classifies as an "act of racketeering activity."

The definition of an "act of racketeering activity" is found at

18 U.S.C § 1961. The definition includes crimes ranging from murder, kidnapping, and extortion, *see* 18 U.S.C. § 1961(1)(A), to embezzlement of union funds, *see* 18 U.S.C. § 1961(1)(C), to the mail and wire fraud alleged in this case, *see* 18 U.S.C. § 1961(1)(B). Therefore, the determination of whether the phrase "pattern of racketeering activity" is void for vagueness is made in light of the phrase itself and those parts of statute that define it.

There exists a preliminary question over the appropriate inquiry. The Supreme Count clearly requires an examination of the language of the statute itself. A second, potentially broader, inquiry is to examine whether the "continuity plus relationship" test of *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) is itself void for vagueness. The Third Circuit appears to have endorsed this second approach in *United States v. Pungitore*, 910 F.2d 1084, 1103 n.15 (3d Cir. 1990), *cert. denied*, 500 U.S. 915-16 (1991) ("we believe that the appellants' primary contention is that the relationship plus continuity test for a pattern of racketeering under RICO is unconstitutionally vague . . . . Thus *H.J. Inc. is* more pertinent than *Fort Wayne Books* to our discussion."). To the extent that the Third Circuit endorsed a void for vagueness challenge to a test created by the Supreme Court, we disagree.

No precedent supports the proposition that a party may attack a Supreme Court decision as void for vagueness. To do so would, in effect, allow a renewed attack on the constitutional validity of the statute itself under the guise of attacking the judicially created "continuity plus relationship test."

First, *H.J. Inc.* itself does not concern the void for vagueness standard as applied to RICO's pattern requirement. The opinion of the Court does not include a void for vagueness analysis. As Justice Scalia pointed out, "[n]o constitutional challenge to this

law has been raised in the present case, and so that issue is not before us." *H.J. Inc.*, 492 U.S. at 255-56.[3]

Second, the idea of subjecting the Supreme Court's statutory interpretation to void for vagueness analysis appears to be without precedent. The reason can best be illustrated by an analogy. What Tatum seeks to accomplish here would be no different from a party, facing a suit under the Sherman Act for engaging in an illegal tying arrangement defending itself by saying, not that the Sherman Act itself is unconstitutionally vague (It is not, *see Nash v. United States*, 229 U.S. 373, 376-78 (1913)), but rather that the Supreme Court's law regarding tying arrangements is unconstitutionally vague. No one will claim that the Sherman Act is a model of specificity. In fact, it makes the pattern requirement of RICO look thoroughly scientific.[4] However, the claims of void for vagueness lodged against it have failed. More importantly, neither is the Court's jurisprudence regarding tying arrangements a paragon of

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3. The majority of the argument offered by Tatum appears to rest on Justice Scalia's concurrence and on further analysis of which justices in *H.J., Inc.* are still on the court. Such arguments are inappropriate. While we understand that changes in Court personnel may alter the outcomes of Supreme Court cases, we do not sit as fortune tellers, attempting to discern the future by reading the tea leaves of Supreme Cook alignments. Each case must be reviewed on its merits in light of precedent, not on speculation about what the Supreme Court might or might not do in the future, as a result of personnel shifts.

4. The exact meaning of the phrase contained in 15 U.S.C. § 1: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal has been the subject of numerous supreme court opinions. 15 U.S.C. § 1. *See also* 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony.").

clarity. In fact, the Supreme Court has directly addressed the issue of tying arrangements thirteen times since the passage of the Sherman Act. Nonetheless, its occasionally obtuse teaching on the issue of tying arrangements does not make the underlying statute unconstitutionally vague.

Judge Easterbrook's discussion of similar, though not identical, issues in *K-S Pharmacies, Inc., v. American Home Products Corp.*, 962 F.2d 728 (7th Cir. 1992), is instructive. In *K-S Pharmacies*, the court's opinion discussed the sufficiency of a Wisconsin statute forbidding price discrimination with respect to the wholesale price of prescription drugs. It noted that the Wisconsin law was "no less precise than the Sherman Act, another law providing for treble damages in private actions and criminal punishment in public ones." *Id.* at 732. Similarly, a complaint that *H.J., Inc.* or *Sedima* provide meaningful, possibly even vital, instruction on the issue of what a pattern is, does not mean that the statutory phrase is unconstitutionally vague. "The Sherman Act was not unconstitutional in 1890, becoming enforceable only in 1913 [when the Supreme Court decided *Nash*]. It has been constitutional all along because it provides a starting place, and courts resolve disputes as they arise." *Ibid.*

We are not completely lacking in guidance regarding the constitutional validity of the pattern requirement in the RICO statute. The Supreme Court has addressed the constitutional validity of a state RICO statute's pattern requirement in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989). *Fort Wayne Books* is particularly compelling because it represented a facial challenge to the statute. Therefore, the statute effectively had to pass constitutional muster in every circumstance. In *Fort Wayne Books*, the Supreme Count stated that "[w]e find no merit in petitioner's claim that the Indiana RICO law is unconstitutionally vague as applied to obscenity predicate offenses. Given that the

RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either." *Fort Wayne Books*, 489 U.S. at 58. We believe the same reasoning applies in this case. That the mail and wire fraud statutes are not unconstitutionally vague is beyond dispute. To paraphrase *Fort Wayne Books*, Tatum cannot be found liable for violating the RICO statute without a jury finding that he engaged in the mail and wire fraud alleged by Columbia. *Ibid.*

Therefore, several factors militate against a holding of unconstitutional vagueness. First, the statute creates a clear line for culpability. One must commit two of the enumerated predicate offenses within ten years. These so called "predicate acts" are, by themselves, violations of either federal or state law. Similarly, although RICO has criminal sanctions, this case only deals with civil sanctions, albeit harsh ones. The Supreme Court has held only one civil statute unconstitutionally vague since 1960, *see Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). The Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

Similarly, RICO is a federal statute, and the Supreme Court seldom voids federal statutes on vagueness grounds. Unlike state statutes, in which a federal court only reviews the state statute and the state court decisions interpreting it, a federal statute is subject to interpretation by the federal courts.[5] The court does not sit

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5. *See Winters v. New York*, 333 U.S. 507, 514 (1948) ("[I]nterpretation by [the state court] puts [the construction] in the statute as definitely as if it had been so amended by the legislature."); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971) (Supreme Court "lack[s] jurisdiction authoritatively to construe state legislation.").

passively and review only what other people have said to determine if a statute is vague. Instead, the federal court interprets the statute itself. Therefore, there are few cases in which the Supreme Court has held a federal statute unconstitutionally vague, as the Court's own interpretations are a means of mitigating any vagueness. *See United States v. Cardiff*, 344 U.S. 174, 176-77 (1952) (reversing conviction for violation of Federal Food, Drug, and Cosmetic Act); *A.B. Small Co. v. American Sugar Red Co.*, 267 U.S. 233, 239 (1925) (upholding vagueness challenge to civil provisions of Food Control Act); *Weeds, Inc. v. United States*, 255 U.S. 109, 110 (1921) (reversing conviction for conspiracy to violate Food Control Act); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (finding section 4 of Food Control Act void for vagueness).

The statute need not define with mathematical precision the conduct forbidden, just as the antitrust laws forbid agreements that "restrain trade," or result in "unfair prices." Instead, to succeed on a claim of unconstitutional vagueness, as the First Circuit has held, the complaining party must do more than show that the statute "requires a person to conform his conduct to an imprecise but comprehensible normative standard." *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990). Instead, the complaining party must prove that "no standard of conduct is specified at all." *Ibid. See A.B. Small Co.*, 267 U.S. at 239 (what is constitutionally offensive is the "exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all"). But there is a clear standard of conduct initially proscribed by the pattern requirement of RICO. Here the statute clearly has a core; to avoid any possibility of falling under RICO's admittedly broad umbrella, one need only avoid committing an enumerated crime twice within ten years. If one can take the time to avoid committing mail

or wire fraud, or extortion, or murder, or any of the other enumerated predicate offenses, all of which are federal or state criminal offenses in their own right, than one can sleep safe in the knowledge that he will not be found to have violated RICO.

The issue, bluntly and simply framed, is whether a person of ordinary intelligence would know that committing dozens if not hundreds of acts of wire and mail fraud, over the course of almost a decade against the same victim, might constitute a pattern of racketeering activity. Since, by its terms it only takes a minimum of two acts, it is simply implausible for a party to claim that it was not aware that committing numerous predicate acts would expose it to potential RICO liability. The statute need not be exact, just as price discrimination statutes and antitrust statutes are not exact. The statute must simply put the party on notice that it is entering a potentially forbidden zone.[6]

Therefore, we hold that the phrase "pattern of racketeering activity" is not unconstitutionally vague. We reject the invitation to subject the Supreme Court's "continuity plus relationship" test to a vagueness analysis. There is simply no precedent for such action.

So long as we use words to govern human conduct, there will be gray areas in the law. But parties cannot raise these hypothetical gray areas in an "as applied" challenge. With respect to a vagueness challenge, there is nothing startling from a legal standpoint in the RICO statute. The simple fact is "[t]he law is full of instances when a man's fate depends on his estimating rightly,

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6. Because this case does not involve any First Amendment issues, Tatum "has standing to raise a vagueness challenge only insofar as the statute is vague as applied lo his or her specific conduct." *Pungitore*, 910 F.2d at 1103. *See New York v. Ferber*, 458 U.S. 747, 767-69 (1982).

that is as the jury subsequently estimates it, some matter of degree." *Nash v. United States*, 229 U.S. 373, 377 (1913). The phrase "pattern of racketeering activity" is broad, but not unconstitutionally vague.

IV

Whether a district court has correctly dismissed a suit pursuant to Fed. R. Civ. P. 12(b)(6) is a question of law, and therefore subject to de novo review. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993); *Allard v. Weitzman (In Re DeLorean Motor Co.)*, 991 F.2d 1236, 1239-40 (6th Cir. 1993). The district court must construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Allard*, 991 F.2d at 1240; *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). When an allegation is capable of more than one inference, it must be construed in the plaintiff's favor. *Allard*, 991 F.2d 1240; *Mayer*, 988 F.2d at 638. Hence, a judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations. *Allard*, 991 F.2d at 1240; *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990).

However, while liberal, this standard of review does require more than the bare assertion of legal conclusions. *Allard*, 991 F.2d at 1240. "In practice, 'a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.' " *Ibid.* (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). *See also Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Air. 1987) (liberal Rule 12(b)(6) review is not afforded legal conclusions and unwarranted factual inferences);

Ana Leon T. v. Federal Reserve Bank, 823 F.2d 928, 930 (6th Cir.) (per curiam) (mere conclusions are not afforded liberal Rule 12(b)(6) review), *cert. denied*, 484 U.S. 945 (1987).

The fact that a statute passes basic constitutional muster does not mean that the complaint meets the requirements of the statute or the Supreme Court's interpretations of the pattern requirement. Thus, even if the statute itself is not void for vagueness, the complaint may still fail to allege a pattern of racketeering activity in conformity with the statute and Supreme Count precedent. Therefore, we next turn to the substance of the complaint itself to determine whether it sufficiently alleges a pattern of racketeering activity.

As we noted, under Rule 12(b)(6) we accept all of the factual allegations as true. The complaint in question is 76 pages in length, and contains approximately 39 exhibits that run another 261 pages. The exhibits include lists of phone calls and logs of correspondence. Columbia alleges that Tatum used both phone calls and letters in its fraud scheme.

The Supreme Count has added flesh to the meaning of pattern in two major cases: *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985); and *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Under *Sedima*, it is the "factor of continuity plus relationship which combines to produce a pattern." *Sedima*, 473 U.S. 479, 496 n.14. The Court further examined the issue of "continuity plus relationship" in *H. J. Inc.*, where the Count held that "it is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged.' " *H.J. Inc.*, 492 U.S. at 239. "Relationship" exists where the conduct in question "embraces criminal acts that have the same or similar purposes, results,

participants, victims or methods of commission . . . and are not isolated events." *H.J. Inc.*, 492 U.S. at 240. "Continuity" is primarily a temporal concept. It refers to a "closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H. J. Inc.*, 492 U.S. at 241.

The complaint clearly alleges two predicate acts within a ten-year period. The issue then, is whether the complaint meets the requirements of *Sedima* and *H.J. Inc.*, and this Circuit's holding in prior RICO cases such as *Fleischhauer v. Feltner*, 879 F.2d 1290 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 *and* 494 U.S. 1027 (1990). Clearly it does. The complaint describes conduct that demonstrates both continuity and relationship.

In *Feltner*, this Circuit has adopted what some have characterized as the "multi-factor test" for determining whether a pattern exists in a given case. Specifically, the court held that "[i]n determining whether the predicate acts are sufficiently continuous and related . . . [the following facts are relevant]: the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Feltner*, 879 F.2d at 1297 (quoting *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1304 (7th Cir. 1987)). *See also Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1063 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990); *Brandenburg v. Seidel*, 859 F.2d 1179, 1185 (4th Cir. 1988). We do not think that either *Sedima* or *H.J. Inc.* worked a significant change in this law. To the contrary, they have buttressed the validity of the multifactor approach to the determination of whether a pattern exists. *See, e.g., Sedima*, 473 U.S. at 496 n. 14.

Therefore, to state the inquiry simply, a pattern is the sum of

various factors including: the length of time the racketeering activity existed; the number of different schemes (the more the better); the number of predicate acts within each scheme (the more the better); the variety of species of predicate acts (the more the better); the distinct types of injury (the more the better); the number of victims (the more the better); and the number of perpetrators (the less the better). Therefore, at one extreme is a perpetrator committing two predicate acts, in one day, in one scheme, causing a single injury, to a single victim. This is not a pattern. *See Sedima,* 473 U.S. at 496 n. 14. At the other extreme, a perpetrator engineering dozens of schemes, and using myriad predicate acts to further each scheme, against numerous victims causing numerous types of injuries, beyond peradventure engages in a pattern of racketeering activity.

The complaint clearly alleges a significant period of activity, albeit closed, of about nine years. Furthermore, the complaint alleges far more than two predicate acts. Indeed, it lists dozens of examples of what Columbia considers to be mail and wire fraud. Similarly, Columbia alleges various kinds of predicate acts, including wire fraud, mail fraud, and travel act fraud. These acts were the foundation for various schemes, including defrauding Columbia of valid leases by failing to drill, defrauding Columbia of valid leases by capping wells, defrauding Columbia of royalties by misreporting the amount of resources extracted from wells, and defrauding Columbia of leases by supporting, secretly, lawsuits by lessees. Furthermore, each of these schemes and the constituent predicate acts resulted in various injuries, including loss of already existing lease rights, loss of future lease rights, and loss of royalties. Similarly, each of the schemes was allegedly engineered by Tatum through his corporations and therefore have a single perpetrator. The only factor militating against a finding of a pattern is the fact that the number of victims is limited. But there is

no per se rule that a weakness in one area is dispositive. Here the limited number or victims is more than balanced by the strength presented in other areas.

Of course, as Tatum stated (vociferously) at oral argument, none of this may be true. In fact, discovery may disclose that the entire story has been concocted from whole cloth, or is a patent exaggeration and does not even remotely resemble a pattern. Or Columbia may be unable to convince a jury that Tatum both committed mail and wire fraud and that these activities also constitute a pattern of racketeering activity. But that is not the standard of review under Rule 12(b)(6). To the contrary, we assume that everything alleged in the complaint is true. As such, the complaint clearly alleges a series of predicate acts that, if proven, would amount to a pattern of racketeering activity.

V

For the foregoing reasons, the judgment of the district court is REVERSED. The matter is REMANDED to the district court for further proceedings consistent with this opinion.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO DATED NOVEMBER 1, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:93CV0234

HON. GEORGE W. WHITE

COLUMBIA NATURAL RESOURCES, INC., et al.,

Plaintiffs,

vs.

ZACHARY TATUM, et al.,

Defendants.

MEMORANDUM AND ORDER

The Seventh and Tenth Causes of Action of the First Amended Complaint are claims under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C, §§ 1962(c) and 1952(d). The remaining causes of action contain state pendent claims. This matter is before the Court upon Defendants' motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

In order to recover under RICO, a plaintiff must show a pattern of racketeering activity. 18 U.S.C. § 1962(c). Defendants

contend that the "pattern requirement is unconstitutionally vague as applied to them. A "pattern of racketeering activity" is defined in 18 U.S.C. § 1961(5) as two predicate acts of racketeering not exceeding a span of ten years intervening between the two most recent acts. The constitutionality of the pattern requirement was raised by Justice Scalia in his concurrence in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Justice Scalia stated that *"[T]he word 'pattern'. . . was meant to import some requirement beyond the mere existence of multiple predicate acts. . . . But what that something more is, is beyond me."* 109 S.Ct. at 2908. The following statement invited constitutional challenge:

> *"That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when challenge is presented. "*

109 S.Ct. at 2909.

In *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir. 1990), the Court found that in the absence of first amendment consideration, a challenge for vagueness must be examined in accordance with the facts of the particular case. Defendants must show that the meaning of "pattern" was unclear and vague as to their conduct. *Id. Corporacion Insular De Seguras v. Reyes Munoz*, 826 F.Supp 599, 607 (D. Puerto Rico 1993). As stated in Angiulo,

> *"[D]efendants must demonstrate that persons of ordinary intelligence in their situation would not have had adequate notice that the offenses at issue here, namely, mail*

> *and wire fraud, laundering of monetary instruments, engaging in monetary transactions in property derived from unlawful activity and interstate transportation and receipt of fraudulently obtained monies constituted a "pattern of racketeering activity" under RICO."*

897 F.2d at 1179.

Most courts that have considered Justice Scalia's comments have held that the RICO statute is not unconstitutional. See *United States v. Ashman,* 979 F.2d 469 (7th Cir. 1992); *Abell v. Potomac Ins. Co. of Illinois,* 946 F.2d 1160 (5th Cir. 1991); *United States v. Glecier,* 923 F.2d 496, 497 n.1 (7th Cir. 1991), *cert denied,* __ U.S. __, 112 S.Ct. 54, 116 L.Ed.2d 31 (1991); *United States v. Coiro,* 922 F.2d 1008, 1016 (2nd Cir. 1991); *Bingham v. Zolt,* 823 F.Supp 1126, 1132 (SD NY 1993); *Schrag v. Dinges,* 788 F.Supp 1543, 1552 (D. Kan. 1992).

Only two cases have been found wherein the challenge to the RICO pattern requirement was upheld. In *Firestone v. Galbreath,* 747 F.Supp 1556 (S.D Ohio 1990), aff, 976 F.2d 279 (6th Cir. 1992), the beneficiaries of an *inter vivos* trust sued family members and business entities to recover assets that allegedly belonged in their grandmother's estate. The Court found that situation far removed from the typical situations which Congress envisioned as being within RICO's scope of coverage. *Id.* at 1581. The Court concluded persons of ordinary intelligence in defendant's situation would not have had adequate notice that the mail and wire fraud, interstate transportation of stolen property and money laundering offenses constituted a "pattern of racketeering activity" under RICO so the "pattern" requirement was vague as to the defendants.

Appendix B

In *Kenty v. Bank One,* 1992 U.S. Dist. Lexis 16645 (SD Ohio 1992), the plaintiff purchased an automobile and obtained a loan from the defendant. She did not provide property insurance as required under the loan. The loan agreement authorized the bank to procure collateral protection insurance in the event the plaintiff failed to maintain insurance on her vehicle. Plaintiff contended that Bank One violated RICO by using the United States mails in its implementation of schemes to obtain kickbacks, rebates and commissions and unauthorized and illegal interest in connection with the procurement of the force-placed insurance. The Court held that vagueness exists in the context of Civil RICO suits not criminal cases wherein the defendants may be guilty of exactly the type of racketeering activity RICO was intended to prohibit.

Plaintiffs in the present case allege that Defendants failed to pay proper royalties to Plaintiffs; that they paid another's legal fees in a suit against Plaintiffs; that they took top leases on property subject to the Farmout Agreements; and that they travelled interstate to accomplish business dealings. There is nothing inherently criminal about these actions. This conduct allegedly constituted violations of the mail and wire fraud statutes and the Travel Act. The Court finds that persons of ordinary intelligence would not have notice that the conduct described above constituted a "pattern of racketeering activity" under RICO. Therefore, the pattern requirement is unconstitutionally vague as applied to these Defendants.

The remaining causes of action are state pendent claims. Since the federal claims are dismissed the Court declines to exercise jurisdiction over them. 28 U.S.C. § 1367(c)(3). *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

Appendix B

Accordingly, the Defendants' motions to dismiss the Seventh and Tenth Causes of Action of the First Amended Complaint are granted pursuant to Rule 12(b)(6). The Court declines to exercise jurisdiction over the remaining state claims and they are dismissed under Rule 12(b)(1) and 28 U.S.C. § 1367(c)(3).

IT IS SO ORDERED.

s/ George W. White
George W. White 10-28-93
UNITED STATES DISTRICT JUDGE

Appendix B

WHITE, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:93CV0234

COLUMBIA NATURAL RESOURCES INC., et al.,

Plaintiffs

v.

ZACHARY TATUM, et al.,

Defendants

ORDER

Pursuant to this Court's Memorandum and Order filed contemporaneously with this Order,

IT IS ORDERED that this case is hereby dismissed.

s/ George W. White
George W. White 10-28-93
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING DEFENDANTS' SUGGESTION FOR REHEARING EN BANC AND PETITION FOR REHEARING FILED SEPTEMBER 5, 1995

No. 93-4299

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COLUMBIA NATURAL RESOURCES, INC., ET AL.,

Plaintiffs-Appellants,

v.

ZACHARY TATUM, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: MILBURN, BOGGS, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk *pe*

APPENDIX D — RELEVANT STATUTORY, CONSTITUTIONAL AND CONGRESSIONAL REPORTS

18 U.S.C. § 1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.] —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative [relating] to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition

of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

Appendix D

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

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(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941; Nov. 2, 1978, P. L. 95-575, § 3(c), 92 Stat. 2465; Nov. 6, 1978, P. L. 95-598, Title III, § 314(g), 92 Stat. 2677; Oct. 12, 1984, P. L. 98-473, Title II, Ch IX, § 901(g), Ch X, Part N. § 1020, 98 Stat. 2136, 2143; Oct. 25, 1984, P. L. 98-547, Title II, § 205(1), (2), 98 Stat. 2770; Oct. 27, 1986, P. L. 99-570, Title I, Subtitle H. § 1365(b), 100 Stat. 3207-35; Nov. 10, 1986, P. L. 99646, § 50(a), 100 Stat. 3605; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B. §§ 7013, 7020(c), 7032, 7054, Subtitle N. Ch 1, § 7514, 102 Stat. 4395, 4396, 4398, 4402, 4489; Aug. 9, 1989, P. L. 101-73, Title IX, Subtitle F. § 968, 103 Stat. 506.)

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18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

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(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 942; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B. § 7033, 102 Stat. 4398.)

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28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire Record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch 646, § 1, 62 Stat. 928; June 27, 1988, P. L. 100-352, § 2(a), (b), 102 Stat. 662.)

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CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions — Provisions concerning —Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

Sec. 2. Representatives — Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

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Sec. 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves, but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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PUBLIC LAW 91-452

AN ACT

Relating to the control of organized crime in the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Organized Crime Control Act of 1970."

STATEMENT OF FINDINGS AND PURPOSE

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden inter-state and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and

because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

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LEGISLATIVE HISTORY
P.L. 91-452

DISSENTING VIEWS OF REPRESENTATIVE JOHN CONYERS, JR., REPRESENTATIVE ABNER MIKVA, REPRESENTATIVE WILLIAM F. RYAN, ON THE ORGANIZED CRIME CONTROL ACT

This bill is another dreary episode in the ponderous assault on freedom. It employs the spirit of repression extant in some quarters as a substitute for the Constitution, custom, and reason. And if all that were not enough, it won't work: it is more likely to catch poachers and prostitutes than it is to catch pushers and pimps.

The statement that opposition to the Organized Crime Control Act can in no way be equated with softness on crime is so obvious that it virtually belies utterance. But given the climate of national vituperation in which this bill was bred, it merits iteration. We all react with outrage to the massive assault being leveled on decent citizens by both organized crime and by street criminals. We all are determined to defeat that assault. In fact, we, more than many of our colleagues, have particular knowledge of the depredations of crime: we all represent major metropolitan areas — the loci of crime in America. It is our constituents who are, with far more frequency than the citizens of the farms and towns and small cities of the Nation, the victims of violent crime — of muggings, robberies, extortion, and murder.

We are dismayed that this oversold bill does so little to redress this situation, even as it rips off large chunks of the Constitution. We are committed to the maintenance of constitutional liberties, and to the cultivation of a system of law

enforcement which maximized effectiveness and efficiency, rather than a repressive shotgun which shoots down innocent and guilty with equal diffidence. We think our Constitution and the needs of law enforcement need not be — and cannot be — at odds.

In opposing this bill, we act with a special sense of the needs of our constituents and with a particular awareness of the severity of crime in the streets. We believe that our constituents — and all Americans — are entitled to receive from their representatives cures and not placebos — particularly placebos wrapped in the coating of the offensive and even unconstitutional trappings that accompany the Organized Crime Control Act bill.

We want to make several points immediately clear about the Organized Crime Control Act bill.

This bill is not the answer to crime in the streets — the muggings, the robberies, the rapes.

This bill is not the answer to the complex problem of juvenile crime.

This bill is not an answer to the destructive penal system which breeds criminals.

This bill is not an answer to the massive backlog of cases besetting the courts — a backlog which in such large measure accounts for criminals roaming free.

In sum, the Organized Crime Control Act is no answer to the hundreds of thousands of criminal acts which are terrorizing this country. It is aimed — at least ostensibly — at organized crime,

and any person who sees in its passage the turning of tide against the street crime which is the vital, immediate concern of every American family suffers faulty vision.

Even so, were this bill an intelligent, reasonable approach to the problem of organized crime, we would gladly support it. As Government officials, we are especially offended at the frequent links between organized crime and politics; and we are deeply concerned about infiltration of legitimate business by organized crime. But, intentionally or otherwise, this bill directly assaults the liberties and rights of all Americans, while only ineptly flailing out at organized crime.

We commend the committee for having considerably improved upon the Senate version of this bill by modifying and deleting at least some of the offensive provisions of that piece of legislation. The result, however, is a "scissors and paste" cosmetizing job that cannot overcome the basic defects of the bill. As Mr. Justice Brandeis wrote in *Olmstead v. United States*, 48 S.Ct. 564, 277 U.S. 438, 485, 72 L.Ed. 944 (1928):

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example * * *. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution * * *.

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Four titles of this bill are particularly egregious: Title I — Special Grand Jury, title VII — Litigation Concerning Sources of Evidence, title IX — Racketeer Influenced and Corrupt Organizations, and title X — Dangerous Special Offender Sentencing. Several other titles also raise serious problems.

TITLE I

Title I authorizes special grand juries to be created at the instance of the Attorney General. These special grand juries have the power not only to indict, but also to submit to the court of their district reports when the evidence is insufficient to warrant an indictment. These reports are to be issued

> (1) Concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or (2) regarding organized crime conditions in the district. (emphasis added)

In brief, this title proposes to create official bodies bedecked with the power to accuse, while leaving the accused bereft of any effective means of rebuttal. This is hardly less than sanctified calumny. And in case anyone might quarrel with our characterization of these special grand jury reporting powers, he might first ponder why the Senate version of this bill was amended by the House committee to exclude elected officials from the reach of these mini-star chambers.

Title I purports to erect procedural safeguards to protect the

non-criminal accused — such as the right to appear before the grand jury and to bring witnesses; a right to respond, and a right to appeal. Anyone familiar with the way grand juries operate knows that these protections are illusory. The nature of the special grand jury makes this even more so.

Firstly, the district court is required to make an unchallenged report (or one sustained on appeal) public if it finds the report is supported by a "preponderance of the evidence." Presumably, any appeal which a named party can take will be adjudicated on this standard and on procedural regularity. In fact, this means that both the initial district court and the appellate court control over the reports is going to be practically nonexistent.

This is so because the bill does not require that only credible, or relevant, or legally admissible evidence be considered. The evidence can be made up of hearsay, unconstitutionally obtained evidence, opinions, unsubstantiated slander, and prejudicial casuistry. So a standard ostensibly geared to some appreciation of the rights of the noncriminal accuses is really completely nebulous.

Moreover, the whole reason for providing the right of appeal is to quash smear campaigns. Yet, grand jury proceedings are notorious for the ease with which the press gains access to their conclusions. And even if the press should miss at that point, the taking of an appeal virtually will insure public disclosure that the appellant has been accused.

Still another procedural flaw — but again, one with very severe substantive ramifications — lies in the supposed safeguard of allowing the person whom the grand jury has decided to name as being guilty of noncriminal misconduct to

appear and produce a "reasonable" number of witnesses. By the time this occurs, the jury has already made up its collective mind and so the accused carries the burden of convincing it to change its conclusion. Yet, he cannot confront the witnesses against him and subject them to cross-examination. Nor does it appear that he even has the right to be apprised of the evidence on which the special grand jury has based its conclusion that he is guilty of noncriminal misconduct. "Prove to us that you're not guilty of anything no matter what anyone has told us" seems to be the ground-rule of this frightening version of the game "I've Got a Secret."

No particular prescience is needed to forecast the public's reaction to a special grand jury's report that an appointed official — though official, but not criminal — misconduct has been helping organized crime. He is going to be branded as an accomplice of organized crime. As the New York court of appeals said in *Wood v. Hughes*, 9 N.Y.2d 144, 154, 173 N.E.2d 21, 26 (1961):

> In the public mind, accusation by report is indistinguishable from accusation by indictment and subjects those against whom it is directed to the same public condemnation and opprobrium as if they had been indicted.

The ordinary grand jury is permitted to sidestep many due process procedural guarantees — representation by counsel, confrontation, public hearing, and the like. But this is because it is only the start of the legal proceedings against a person. The regular grand jury can only return an indictment; the "grand jury merely investigates and reports. It does not try." *Hannah v. Larche*, 80 S.Ct. 1502, 363 U.S. 420, 449, 4 L.Ed.2d 1307 (1960).

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Mr. Justice Frankfurter, concurring in Hannah wrote:

> Were the Commission exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides. *Id.*, 488.

We would particularly note the Court's opinion in *Greene v. McElroy*, 79 S.Ct. 1400, 360 U.S. 474, 3 L.Ed.2d 1377 (1959), which involved the validity of an inquiry conducted for the purpose of determining whether the security clearance of a particular person was to be revoked. A denial of clearance would shut him off from the opportunity of access to a wide field of employment, as well as causing him to lose his current job. The Court said:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is

> even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirement of confrontation and cross-examination. This Court has been zealous to protect these rights from erosion. *It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny* . . . Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. *Id.*, 496-97 (emphasis added).

Title I is very properly concerned with official corruption. But the avenue it chooses to combat this vice deprives both the innocent and the "guilty" of basic rights of due process. Surely, we need not corrupt civil liberties in order to combat corruption in public office.

TITLE VII

Title VII has been considerably improved over the version which was included in the bill which passed the other body. However, philosophically, it remains perhaps the most distressing provision of this bill. It demonstrates an antipathy toward, and impatience with, the exercise of constitutional rights which reflects another grim chapter in the attempts to uplift expediency to the level of constitutional legitimacy.

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The title imposes a statute of limitations on the exercise of the right to challenge the admissibility of illegally obtained evidence. It does this by adding a new section to chapter 223 of title 18 of the United States Code which provides, in section 3504(3), that in any trial, hearing, or other proceeding,

> No claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than 5 years after such allegedly unlawful act.

We are aware that, as a practical matter, this provision will not have great application, since it does not apply to acts involving the obtaining of evidence which occurred after June 19, 1968. But any essay at foreclosing the exercise of a constitutional right must be rejected, whether it is of wide applicability or otherwise. Both in terms of its own operation, and as precedent for subsequent efforts by the government, this encroachment is dangerous.

Statutes of limitations have validity because they bar stale claims; the provision here would bar defenses. As the report on the Organized Crime Control Act of the Association of the Bar of the City of New York states, at page 24:

> It may be reasonable to preclude the commencing of litigation after a given period of time — either because the defendant should not be forced to answer, nor the courts to hear, charges which can only be

> substantiated by evidence weakened by time, or because the plaintiff has been negligent in failing to bring suit earlier. It would be a novel application of this logic, however, to allow the defendant to be brought to trial and at the same time to hamper his defense by precluding him from raising constitutional issues which might otherwise be available to him.

Title VII represents the kind of insidious erosion of constitutional protections which is always justified by the contention that the diminution of liberty is negligible, or insignificant. We do not regard the fourth amendment as susceptible to characterization by either of these terms, nor do we regard this title as anything less than an invidious assault upon that amendment.

TITLE IX

Title IX, entitled Racketeer Influenced and Corrupt Organizations, seeks to stymie organized crime's growing infiltration of legitimate business.

But it runs amuck. It embodies poor draftsmanship, and it employs penalties and investigative procedures which are both abusive and pregnant with the potential for abuse.

Prohibited activities

Section 1962 of title IX defines prohibited activities. Subsection (a) provides that:

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> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Thus, as to racketeering, the following must be established for a prohibited activity to exist: two or more separate acts of racketeering activity, thereby establishing the "pattern," and the direct or indirect use or investment of the gains derived therefrom. This burden imposed upon the prosecution seems perverse, since the very reason why we have thus far been so unsuccessful in striking at organized crime lies in the difficulty of even securing one conviction. Here, the prosecution, absent any prior conviction, would have to prove beyond a reasonable doubt two illegal acts in order to establish the "pattern." Yet, if it could secure even one conviction, it would not need this section.

What is more, the massive infiltration by organized crime of legitimate business is a consequence of the difficulty of tracing the path from illegal gains to investment of them. Yet, this burden of tracing is also imposed upon the prosecution by section 1962(a)'s language. And, if this path could in fact be traced, then the investor could be prosecuted under existing Federal law,

anyway, for income tax evasion, as well as for State offenses in many cases.

Thus, in their zealousness to get at organized crime, the drafters of this bill have employed language which may only succeed in erecting a procedure to insulate its operants from successful prosecution under this title.

Unlawful debt

Similar inept draftsmanship resides in the failure to provide a workable definition for one of the most important terms in title IX — "unlawful debt." Use or investment of funds collected on an unlawful debt constitutes a prohibited activity under section 1962 and is punishable under section 1963. But the definition of the term, as provided in section 1961(6) creates two problems. This section reads:

> (6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate; * * *

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This provision, by employing the words "a State," raises both very difficult jurisdictional problems, and substantive problems arising from the creation of a Federal law of gambling and of usury. For example, a transaction may have connections with two or more States; in one, it is legal, in another not. Innocent action in one State will be the premise for establishing the collection of an "unlawful debt" in another State under title IX. Which State's laws are to govern?

Then, there is also the problem that arises because the use of the words "a State" creates Federal laws of gambling and usury. The language implies a standard geared to the most stringent State law, and apparently will make collection and use of funds derived from a debt incurred in the business of gambling in Nevada the premise for establishing an unlawful act, because other States outlaw such businesses. Similarly, a loan at 12 percent interest may be legal in State Y, but because 6 percent is the maximum nonusurious interest rate in State X, collection of the debt in State Y by a citizen of State Y from a fellow citizen of that State will constitute collection of an "unlawful debt."

This inept draftsmanship gives some indication of much of the quality of this bill. In observing the patchwork collection of these provisions — admirable in their intent to fight organized crime, but seriously compromised by virtue of the barriers they erect to effective implementation — we are reminded of Chief Justice Burger's admonition in his State of the Judiciary address on August 10. In noting the burdens the courts face, the Chief Justice said:

> The difficulty lies in our tendency to meet new and legitimate demands with new laws which are passed without adequate

consideration of the consequences in terms of caseloads.

Undue penalties

Section 1962 opens the door to 20 years in prison, a $25,000 fine, and forfeiture of property, all because a man won $1,000 on two separate instances in a gambling game. It does so by prohibiting the use or investment of funds either directly or indirectly. The so-called racketeer need not directly use this $1,000 to buy a business in order to run afoul of the title. The mere fact that this $1,000 enabled him to utilize another, legally obtained $1,000 to buy the business, rather than necessary food and clothing, brings him within the ambit of "indirect" use.

The potential for abuse here by the most flimsy legal argumentation — abetted beforehand by newspaper notoriety that the defendant is an organized crime member — very seriously outweighs the benefits of convicting the man. Granted, we may welcome an organized crime member's conviction, but the title makes no discrete segregation of mobsters. It is a tool to be employed for all.

Indeed, another section of the title — section 1964(c) — provides invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce by authorizing private damage suits. A competitor need only raise the claim that his rival has derived gains from two games of poker, and, because this title prohibits even the "indirect use" of such gains — a provision with tremendous outreach — litigation is begun. What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish — destruction of the rival's business.

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The erection of the penalty of forfeiture represents similar overreaching, made that much more severe by the "indirect use" bootstrap which can lift the prosecution into a conviction. The convicted offender is to be compelled to forfeit all interest, direct or indirect, in any enterprise which he has obtained, controls, or in which he participates, by use of funds derived from a "pattern of racketeering activity" or collection of an "unlawful debt."

Criminal forfeiture and corruption of blood were outlawed by the First Congress, in 1790. The present statute, 18 U.S.C. 3563, provides: "No conviction or judgment shall work corruption of blood or any forfeiture of estate." Under the broad gaged language of title IX, we leave that 180-year-old standard. We think the potential scope for deprivation of property by criminal forfeiture constitutes a threat to legitimate business far beyond what should be the ken of a bill aimed at organized crime.

Moreover, not only does criminal forfeiture unduly penalize the man who may simply have engaged in two separate poker games and thereby subjected himself to accusation for having engaged in a "pattern of racketeering activity." It also leaves far too uncertain the rights of entirely blameless citizens and organizations. A minor legislative bow in their direction is made in section 1963(c), which states that "The United States shall dispose of all such property (which has been forfeited to it) as soon as commercially feasible, making due provision for the rights of innocent persons." But the seizure and sale by the Government of property which was used as collateral by the offender for a legitimate loan may well leave an unsecured creditor out of luck, or sale by the Government of a forfeited business on a stagnant market may well undercut innocent competitors or customers.

Even the Justice Department's comment on this measure establishing criminal forfeiture — a measure which overturns an act of the same Congress which proposed to the States for ratification the Bill of Rights — is pallid endorsement, compared to its espousal of numerous other repressive features of this bill. By letter of August 11, 1969, from Richard Kleindienst, Deputy Attorney General, to the Honorable John L. McClellan, chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, the Justice Department's position was stated thusly:

> It is felt that this revival of the concept of forfeiture as a criminal penalty, limited as it is in section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of congressional wisdom rather than a constitutional power.

We perceive little "wisdom" in reviving criminal forfeiture after its 180-year dormancy, particularly when it is couched in the loose language of title IX. We seem to fight corruption of business with corruption of blood, which is neither wise nor constitutional.

Administrative fishing expeditions

Finally, we find very significant potential for administrative abuse in section 1968 of title IX, which authorizes civil investigations. In effect, the Attorney General is given carte blanche to engage in fishing expeditions, unfettered even by the controls of a grand jury's proceeding. This section opens the

books of virtually every business to Government search, and makes the Attorney General the Grand Chatelain of American enterprise.

Specifically, the language of section 1968 reads:

> (a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for investigation.

It seems somewhat perverse that the widest type of faith in grand juries is reposed in title I's creation of special grand juries authorized to investigate noncriminal conduct, while, at the same time, this provision of title IX totally ignores the role of the grand jury.

The grand jury, adopted as a safeguard against hasty, malicious, and oppressive action, *Ex parte Bain*, 121 U.S. 1, 12, at least allows a citizen or enterprise which has opposed against it the power of the Federal Government to seek the protection of the supervising court. Section 1968 retracts that protection and makes every business subject to harassment and abuse. And, again, the so-called protective provisions of title IX are totally illusory.

Title IX should not be adopted. It both fails to do effectively

what it sets out to do and succeeds in doing far too much what it should not do. The rights of property and person need not conflict with the effective combatting of crime, notwithstanding that title IX would have them do so.

TITLE X

Title X deploys the powers of the government to seek incarceration of so-called dangerous special offenders for up to 25 years. In doing so, due process is denied. Were mobsters the only victims of this assault on the Constitution, we would still object. The fact that all defendants are the prey of its provisions makes the title even more indefensible, since even the overzealousness of the drafters to stem organized crime fails as the minimal justification of good intentions it might otherwise provide.

As the report of the association of the bar of the city of New York states, at page 34-35:

> (S)ince the effect of this title might be to increase a sentence from 2 to * * * (25) years in an individual case, due process demands adequate protection for the defendant subject to such penalties. * * * We think that it is unlikely that the proposed procedures would pass constitutional muster.
>
> It is unnecessary, however, to determine what constitutional protections are required in a proceeding such as this — whether a full adversary proceeding and jury trial or something less is required — because we

> believe that the safeguards contained in this title are patently inadequate.

The dangerous special offender procedure is initiated by the prosecutor filing with the court, a reasonable time before trial or acceptance of a plea of guilty or nolo contendere on a felony charge, notice specifying that the defendant is a dangerous special offender. This allegation is not an issue before the trial court. After the plea or a guilty verdict, the court is to hold a hearing, and at this juncture, the issue of the defendant's subjection to title X comes to the fore.

Section 3575 provides a two-step definition for dangerous special offender. First, special offender is defined in subsection (e) to be a defendant who (1) has been convicted of two or more offenses punishable by death or imprisonment for more than 1 year, one of which has occurred within the past 5 years, and for one of which he has been imprisoned; or (2) has committed the present felony as part of a criminal pattern of conduct which "constituted a substantial source of his income, and in which he manifested a special skill or expertise;" or (3) has committed the felony as part of a conspiracy with three or more to "engage in a pattern of conduct criminal under applicable law" and played some kind of active role, or used force or bribes in all or part of such conspiracy.

Then, a special offender may be deemed dangerous "if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant."

Despite the complexity of definitions in section 3575(e), and the complexity of verbiage in which the sentencing function of

the court and the review function of the appellate court are couched, title X is, in blunt language, an end run around due process. Prof. Peter Low aptly stated the matter in his testimony before the Senate subcommittee on this bill:

> It may well be possible under this act to convict a defendant of a minor felony carrying only a 2-year maximum sentence, charge him at the same time with being a professional offender, find him to be such an offender on the basis of information to which he does not have access, and sentence him to * * * (25) years. * * * The whole proceeding smacks of one which is motivated by an inability to prove beyond a reasonable doubt to a jury in open court the facts on which the sentence is based.
>
> — Senate Hearings, 190-191.

The operative language for this grim gutting of liberty is provided in that portion of subsection (b) of section 3575 which reads:

> If it appears by a preponderance of the information submitted during the trial of such felony and the sentencing hearing and so much of presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed 25 years and not disproportionate in severity to the maximum

> term otherwise authorized by law for such felony.

To impose the special dangerous offender sentence, the judge will have to make a number of determinations — dangerousness, as determined by the need of the public for protection, and special offender status, as determined by any of the three definitions the title provides.

In doing so, the judge will in effect be ruling on a new charge leading to criminal punishment, *Specht v. Patterson*, 87 S.Ct. 1209, 386 U.S. 605, 610, 18 L.Ed.2d 326 (1967), for far more is involved than the traditional assessment of whether the defendant engaged in a proscribed course of conduct. *Witherspoon v. Illinois*, 88 S.Ct. 1770, 391 U.S. 510, 522 n. 20, 20 L.Ed.2d 776 (1968). The function of the judge in title X, although it may be disguised as a sentencing role, is in reality, to assess guilt. And this is the very function which is denied a judge acting outside the bounds of required rules of evidence. This eminently important point is explicated by a case which some have cited as support for title X's procedure — *Williams v. New York*, 69 S.Ct. 1079, 337 U.S. 241 (1949) — where Mr. Justice Black delivered the majority opinion:

> In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned from criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. * * * A sentencing judge, however, is not

> confined to the narrow issue of guilt. His task, within fixed statutory or constitutional limits, is to determine the type and extent of punishment after the issue of guilt has been determined. * * *
>
> — *Id.*, 246-47.

It is, in fact, guilt which the judge determines under title X. For he is authorized — encouraged — to look at the defendant's past acts, to find a pattern of criminal conduct, and the only required nexus between the past acts and the present one need by "similar purposes, results, participants, victims, or methods of commission. * * * " He may take into account almost any post conviction — no matter how trivial — in reaching the conclusion that a pattern exists. He may consider the defendant's special skill and expertise — a phrase defined in the widest terms in section 3575 (e) (3). He may take into account a conspiracy of which the felony was a part, even though the defendant may not have been convicted, or even charged with, that conspiracy.

This procedure might be less a parody of justice were the defendant accorded adequate due process rights. But he is not. A preponderance of the information is the standard by which the next 25 years of his life are to be geared. Again, the report of the association of the bar of the city of New York very precisely presents the problem, at page 35:

> The trial court is directed to base its findings on a "preponderance of the information," yet the sentencing decision may be far more critical than the initial determination of guilt or innocence which

> must be made on the basis of admissible evidence and beyond a reasonable doubt. "Information" of all kinds, not only hearsay and rumor but also, presumably, the fruits of unlawful searches or illegal wiretapping, could be used and the defendant sentenced to * * * (25) years without any of the real protections afforded by a jury trial.

To insure that the judge is aware that he may employ all sorts of data which would be inadmissible at trial, section 3577 provides that "no limitation shall be placed on the information concerning the background, character, and conduct" of the defendant.

The parody does not even stop at this point. For, despite the purported protections provided the defendant, the simple fact of the matter is that he may not even gain an opportunity to be apprised of the information on which the trial judge bases his conclusion that he is a dangerous special offender.

Granted, the defendant is accorded the rights of counsel, compulsory process, and cross-examination "of such witnesses as appear at this hearing." But, these are paper rights. Cross-examination of a probation officer who prepared a presentence report can hardly be equated with cross-examination of the sources of that report.

Finally, almost as a gratuitous final blow at due process, this title permits an inference of guilt to be drawn, by virtue of section 3575(e) (3), from the fact that the defendant "has had in his own name or under his control income or property not explained as derived from a source other than (criminal) conduct." This

clearly violates the fifth amendment privilege against self-incrimination by penalizing the defendant for refusing to testify. See, generally, *Marchetti v. United States*, 88 S.Ct. 697, 390 U.S. 39, 19 L.Ed.2d 889 (1968). Moreover, there is simply insufficient constitutional nexus between unexplained income and the presumption that it must have come from an illegal source. Cf. *Leary v. United States*, 89 S.Ct.1532, 395 U.S. 6, 23 L.Ed.2d 57 (1969); *United States v. Romano*, 86 S.Ct. 279, 382 U.S. 136, 15 L.Ed.2d 210 (1965).

Section 3576 authorizes the defendant and the Government to appeal both the imposition and the length of a "dangerous special offender" sentence. When the government appeals, the appeals court is empowered to impose any sentence which the trial court could have imposed, including both increases in the length of the sentence and reversal of the decision that the defendant was not a dangerous special offender.

We do not believe that the Government should be given the power to have sentences increased on appeal. We strongly agree with the recommendations of the advisory committee of the American Bar Association's Project on Minimum Standards for Justice which, while endorsing appellate review, recommended that the appellate court have no power to increase the sentence on appeal, no matter which side initiates the appeal. ABA Standards on Appellate Review of Sentences 3.4 (tentative draft 1967).

The procedure contained in title XI would raise serious constitutional problems of both due process and double jeopardy. Those who support title X cite *North Carolina v. Pearce*, 89 S.Ct. 2089, 395 U.S. 711, 23 L.Ed. 656 (1969). We think they err.

The Court in Pearce did not hold that all sentences could be increased on appeal. It held only that:

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> A judge is not constitutionally precluded * * * from imposing a new sentence, whether greater or less than the original sentence, in light of events subsequent to the first trial * * * The reasons for his doing so must affirmatively appear. Those reasons must be based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing.
>
> —*Id.*, 723, 726.

Thus, Pearce pointed to posttrial actions. Title X points to pretrial actions.

Moreover, the central thrust of the Pearce decision was that the defendant must not be penalized for seeking appeal. Ostensibly, the provisions in title X which limit increase to those cases in which the Government appeals and require the Government to file its appeal 5 days before the defendant's time for appeal expires, preclude the possibility of penalty. Pragmatically, they do not. The defendant will still be subject to Government pressure, for there is nothing to prevent the Government from routinely filing appeals to be pursued only if the defendant appeals — thus evading the protective time limit entirely. But even more important is the bargaining leverage which this power would give the Government over the defendant's decision whether or not to plead guilty and whether or not to appeal both his conviction and his sentence. As the ABA advisory committee put it in the commentary on the draft standards:

> The existence of such a power could well have the effect of preventing the defendant from appealing even on the merits of his conviction. The ability to seek an increase could be a powerful club, the very existence of which — even assuming its good faith use — might induce a defendant to leave well enough alone. ABA Standards on Appellate Review of Sentences 57 (1967).

In addition to authorizing the Government to seek an increase in the length of the original sentence, title X permits the Government to appeal the "imposition" of the sentence. This would permit the Government to seek appellate reversal of the trial court decision that the defendant is not a dangerous special offender. As we have pointed out, the decision that a defendant is a dangerous special offender constitutes in fact a guilty verdict on substantive criminal charges. Viewed in this light, the decision that a defendant is not such an offender cannot be distinguished in any meaningful way from an acquittal. It is crystal clear that the double jeopardy clause prohibits the Government from appealing an acquittal. *Kepner v. United States*, 24 S.Ct. 797, 195 U.S. 100, 49 L.Ed. 114 (1904) Cf., *Green v. United States*, 78 S.Ct. 221, 335 U.S. 184, 2 L.Ed. 199 (1957). The fact this whole proceeding has been disguised as "sentencing" should not permit the Government to do so here.

Again, the impact on the "bargaining" would be enormous. Almost every defendant could be frightened out of an appeal no matter how meritorious, if the Government agreed to avoid seeking review on the "dangerous special offender" charge.

Title X, were it not such a dangerous special offender itself,

would be ludicrous, the product of a caveman's course on the Constitution. As it is, it contravenes the Constitution, it substitutes revenge for reason, and it flaunts the concept of fair treatment. It is parody of justice made tragic by the damage it will do — to individuals, and more important, to our system of rule by law.

OTHER TITLES

The titles we have discussed above appear to be the most objectionable portions of the Organized Crime Control Act. However, there are aspects of the other titles which also raise serious questions which mandate rejection of this bill.

We think these, too, reflect the regrettable result of an eager gesture toward combating crime, divorced from sufficient consideration of the problems of implementation.

Title II

Title II proposes to supplant the absolute immunity granted to those forced to sacrifice their fifth amendment right to remain silent, for transaction, or use, immunity. This departure is premised on the views of some attorneys and legal scholars that *Counselman v. Hitchcock*, 12 S.Ct. 195, 142 U.S. 547, 35 L.Ed. 1110 (1892) (which set the requirement at absolute immunity) has been overruled by *Murphy v. Waterfront Commission*, 84 S.Ct. 1594, 378 U.S. 52, 12 L.Ed.2d 678 (1964).

Without arguing the merits of the dispute concerning the relationship of *Counselman* and *Murphy*, we seriously question the wisdom of legislative change in this field. The courts have

fashioned the rules concerning immunity, and we feel the changes being molded should continue to reside within their purview.

Moreover, we question whether due regard has been given the constitutional protection of the fifth amendment in the fashioning of this title.

Title VI

Title VI likewise has a desirable aim — in this case, enabling the Government to preserve testimony in a criminal proceeding by authorizing the taking of pretrial depositions. However, as is so typical of much of this bill, inadequate regard for the defendant — and we emphasize that we are talking about the defendant who may well be innocent — is a hallmark. We think that the report of the Association of the Bar of the City of New York on the Organized Crime Control Act very aptly points out the problem:

> One of the most serious problems with title VI is that it fails to deal with the need of a criminal defendant, faced with cross-examining a Government witness in a deposition, for information as to the theory of the Government's case and some opportunity for pre-trial discovery. We doubt whether a defendant can effectively cross-examine at a pretrial deposition with the limited discovery rights provided under the rules now governing criminal procedure. * * * At a minimum, the Government should be required to provide a statement of its theory and the expected testimony in sufficient detail to enable the defendant to appreciate the significance of the testimony. [Pp. 17-18.]

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Title XI

Title XI reflects the deep distress that every member of the committee shares about the bombings shaking our streets and college campuses. These criminal acts have imperiled life and property, and must be stopped.

We can appreciate, then, the heat of emotion which has produced this title. However, we question whether it is wise or necessary. The limitation which burdens State and local authorities in their lack of adequate personnel and equipment. Instead of meeting this need, title XI proposes to erect another hierarchy of enforcement.

Rather than providing funds and training so that local authorities might possess the personnel and techniques safely and intelligently to curtail criminal bombings, the title opens the doors to prowling FBI agents, whether requested or not, and this encourages the aura of repression which provides the fuel upon which extremists feed and which they employ to solicit more moderate allies. Moreover, we think the September 24, 1970, editorial of the Los Angeles Times very correctly makes the point that, in fact, the FBI already has all the powers necessary in this area:

> We see no evidence that the local law enforcement authorities, with the considerable help that the FBI is now empowered to give them, are not as adequate to the task as the FBI. The FBI already furnishes local authorities valuable assistance in its finger-print files and laboratories. Upon receiving a warrant from

> local authorities, the FBI can pursue a presumed fugitive, as it did in the recent fatal bombing at the University of Wisconsin. The FBI does not need more authority for more effective employment of its tools against terrorism — and must not be granted it unless the country wants the FBI to become a national police force usurping local law enforcement.

We also question very seriously the wisdom of adoption of the death penalty in title XI. We, like every reasonable citizen, condemn out hand the violence of these criminal bombers. We find no conceivable condonation for the injuries and even deaths they have inflicted. But we are not led thereby to the conclusion that the death penalty will deter such violence. We would note, for example, that the general move in the Nation has been away from the death penalty. Title XI overrides that trend.

It is ironic that the death penalty is one of the very issues under consideration by the National Commission on Reform of Federal Criminal Laws — a Commission which is the creation of the Congress. Indeed, so are many other issues which this bill so summarily treats.

At the very least, we ought to await the conclusions — due in November of this year — of the very body we have created to "make a full and complete review and study of the statutory and case law of the United States which constitutes the federal system of criminal justice for the purpose of formulating and recommending to the Congress legislation which would improve the federal system of criminal justice." Instead, without any hearings whatsoever, the committee has dropped this title — which bears no relationship to organized crime — into the Organized Crime Control Act.

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Laws born of the passion of the moment rarely merit the approval of time.

CONCLUSION

Never has a bill masqueraded under false pretenses more than the Organized Crime Control Act. From its title all the way through title XI, on bombing, it promises succor to an anxious nation. It will not deliver, because it seeks easy answers to hard and expensive problems. Even in its draftsmanship it would rather equivocate than fight. Thus one searches the bill in vain for a definition of "organized crime." In a criminal statute where the term "organized crime" is an operative device, it is not defined. When asked about the omission, the drafters explained that it was impossible to define, but everybody knew what it was.

On such shoals has the crime fight come a cropper. Wherever the real effort is to be made to remove crime, organized and otherwise, from the everyday fears of the American citizen, one will not find it in the Organized Crime Control Act. Like the defining of "organized crime," the drafters of the bill found the task too hard.

We oppose this bill. It should not be enacted into law. We must conclude with Mr. Justice Stewart, writing in *Elkins v. United States*, 80 S.Ct. 1437, 364 U.S. 206, 4 L.Ed.2d 1669 (1960), that "nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

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